INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	8

CITATIONS

Cases:

Post v. *United States*, 135 Fed. 1	7
United States v. *Post*, 113 Fed. 852	7

Statutes:

Section 18, Communications Act Amendments, 1952, 66 Stat. 711, 722, amended by the Act of July 11, 1956, 70 Stat. 523	2
18 U.S.C. 1341	2
18 U.S.C. 1343	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 267

ADAM BAGDASIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not yet reported. The opinion of the district court (Pet. App. 7-14) is reported at 188 F. Supp. 683.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1961 (Pet. App. 6). On June 20, 1961, the Chief Justice extended the time for filing a petition for a writ of certiorari to July 28, 1961, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The indictment charged that petitioner devised a scheme to defraud and for obtaining money from named persons by means of false and fraudulent pretenses, representations, and promises. It alleged the details of the scheme and a number of representations petitioner made to his intended victims, and charged that each of these representations was known by him to be "false and fraudulent." The question is whether the indictment was fatally defective for failure to allege *in haec verba* that petitioner did not intend to carry out his representations or that he was incapable of doing so.

STATUTE INVOLVED

Title 18, Section 1343 of the United States Code provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.[1]

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[1] This "wire fraud" statute was added to the Code by Section 18 of the Communications Act Amendments, 1952, 66 Stat. 711, 722, and was amended by the Act of July 11, 1956, 70 Stat. 523, to cover communications in foreign as well as interstate commerce. The language involved here was taken verbatim from the mail fraud statute, 18 U.S.C. 1341.

STATEMENT

A thirteen count indictment returned in the District Court for the District of Maryland charged, in the language of 18 U.S.C. 1343, *supra*, that petitioner "unlawfully and knowingly devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from John Allen, E. R. Culpepper and other persons who could be induced by the [petitioner] to believe that they could place bets on horse races, by telephone, with a bookmaker by whom the [petitioner] was employed, and that after the races were run, the [petitioner] would change losing bets to show the names of winning horses thereby obtaining winnings to which they were not entitled, which winnings were to be shared with the [petitioner.]" In describing the details of the scheme, the indictment alleged that petitioner, using an assumed name, Harold Green, leased an apartment in Takoma Park, Maryland, and had a telephone installed which he used to call Allen and Culpepper and others "he intended to defraud." This was followed by allegations that petitioner "did falsely represent to those he intended to defraud that his name was George Simon"; that he was the office manager of a bookmaking establishment in Washington, D. C.; that he could "change a bet after the race was won, thus assuring a winning bet"; that, by opening accounts with him, "those he intended to defraud" could place bets by telephone and he would change the records to show that winning horses had been bet; that he had opened accounts for Allen and Culpepper; that

Allen would have to make a deposit of $5,000 before he could collect his winnings; that Culpepper had won large sums; that he had made a record that Culpepper had deposited $5,000, the bookmaker's auditors were about to make an examination of the records, he was $5,000 short in his accounts, and that Culpepper would have to wire him $5,000 in the name of Larry Ford before he could go to the establishment and arrange for the payment of Culpepper's winnings. It was further alleged that each of these "pretenses, representations and promises" was known by petitioner "to be false and fraudulent" and was made "with the intent and purpose of inducing John Allen, E. R. Culpepper and other persons * * * to pay over to him large sums of money." (R. 8-10.) Finally, each count alleged that, "for the purpose of executing the said scheme and artifice to defraud," petitioner made an interstate telephone call or caused an interstate Western Union money order to be sent to him (R. 10-16).

The district court denied petitioner's motion to dismiss the indictment, in which, so far as pertinent here, he complained only that the allegations as to his acts and representations did not "constitute a scheme to defraud" (G.A. 1.[2] See Pet. 4, fn. 2). He demanded and received certain particulars (R. 16-19), but he sought no further specifications as to his intent or capacity to carry out his alleged fraudulent representations.

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[2] This reference designates the appendix to the government's brief in the court of appeals, a copy of which we have lodged with the Clerk.

After a trial without a jury, the district court acquitted petitioner on the first six counts[3] but found him guilty on counts 7 through 13 (R-1-8) and sentenced him to imprisonment for one year (R. 1). The court of appeals unanimously affirmed the conviction (Pet. App. 1-6).

ARGUMENT

Petitioner's sole contention here (Pet. 4-7) is that the indictment was fatally defective because it did not contain specific allegations that his "representations were false and fraudulent in the basic sense that petitioner never intended to carry them out or lacked the means to execute them" (*id.*, pp. 4-5). He argues that a fraudulent intent is an essential element of the crime and that, unless the accused's intent is alleged in those precise terms, such an indictment becomes a "generator of a determination of the morality" and "unreasonableness" of his representations, rather than of his guilt of fraud (*id.*, p. 6).[4]

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[3] The acquittal on these counts was based upon the court's finding that the government's proof as to the dates and substance of the telephone calls they involved did not conform to the information set forth in the bill of particulars (R. 7).

[4] Petitioner takes a different tack here than he did below in challenging the indictment. In the court of appeals he argued that the indictment was bad because it did not allege in what respects his representations were false in fact. The court of appeals rejected this contention, holding that the allegations that petitioner knew the representations were false and fraudulent were sufficient and that it was not necessary to allege "the opposite of the representations" (Pet. App. 3-4).

It is, of course, a truism that a fraudulent intent is an essential part of the offense, but we think petitioner is clearly wrong in contending that the indictment was defective in this respect. No particular formula is required in a charge of fraud. On any fair reading, the indictment here did contain the allegations of fraudulent intent which petitioner claims were lacking. And the evidence amply supported the district court's specific finding that "he intended to double-cross his ostensible partners, actually his victims, and succeeded in doing so in the case of Culpepper" (Pet. App. 12; R. 6).[5]

After listing petitioner's "pretenses, representations and promises," the indictment specifically alleged that each of them was "false and fraudulent and [was] at all times known by him to be false and fraudulent" (R. 9). Without more, this was sufficient to charge an intent not to carry out the representations and to negate good faith, for the allegation that they were knowingly false and fraudulent itself imports such an intent. But this was not all. The indictment twice referred to the victims as persons petitioner "intended to defraud" (R. 8, 9). It was alleged, in addition, that the representations were made "with

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[5] Because of the limited issue on which certiorari is sought, we have not summarized the evidence. It is reviewed at length in the district court's opinion and findings (Pet. App. 7-14; R. 1-8). We would add that the court's opinion completely refutes petitioner's assertions that the evidence was insufficient and that there was a variance between the indictment and the proof, points which he desires to "reserve the right to urge" if certiorari is granted on the question he presents. (Pet. 2, fn. 1).

the intent and purpose of inducing [the victims] to pay over to [petitioner] large sums of money" (R. 9-10). As the court of appeals observed, it is difficult to perceive how any additional allegations as to his intent to defraud "would have been more enlightening" to petitioner (Pet. App. 4). The very essence of the charge as a whole was that the representations were the means he used to defraud his victims and that he never intended to attempt to fulfill them.

With respect to petitioner's contention that there should have been an allegation as to "his incapacity to fulfill his representations" (Pet. 6), the answer is that if, as charged and proved here, the accused is bent on a scheme to defraud it is immaterial whether he had the means to carry out his fraudulent pretense.[6]

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[6] Petitioner's reliance upon *United States* v. *Post*, 113 Fed. 852 (S.D. Fla.), is misplaced. The indictment there charged a scheme to defraud by promising to "cure all diseases and poverty by mental science." It was dismissed because there were no allegations that the representations were knowingly false and fraudulent. A later indictment which, like the indictment here, contained such allegations was sustained. *Post* v. *United States*, 135 Fed. 1, 6-8 (C.A. 5).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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